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No. 04-955

IN THE

Supreme Court of the United States

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Petitioners,

v.

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, Ph.D., DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, MARGARET P. REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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LIST OF THE PARTIES TO THIS PROCEEDING

When the petition was filed, William C. Reynheer was not listed as an interested party because he was deceased, and no motion had been made to substitute his estate or his wife as a party. In light of the new information provided by respondents in connection with their subsequent motion to substitute Mr. Reynheer's wife as a party, and in light of the January 25, 2005 Order issued by the Second Circuit Court of Appeals, petitioners agree that Margaret P. Reynheer should now be added as an interested party to this proceeding on behalf of her deceased husband, William C. Reynheer.

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Petitioners respectfully submit this reply to respondents' brief in opposition to the petition for a writ of certiorari.

REPLY TO COUNTERSTATEMENT OF THE CASE

Petitioners disagree with respondents' claims that petitioners have made misstatements or false assertions to this Court. The statement of the case and other statements of fact made in the petition are fully supported by the record, including the testimony of witnesses and other evidence submitted at trial. Petitioners, however, will not refute each and every allegation made by respondents at this stage as they believe that it is beyond the purview of a reply.

Notably, however, respondents continue to focus, as they did at trial, on allegations that are more consistent with their disparate treatment age discrimination claims than with their claims of disparate impact. The Second Circuit, too, apparently equated disparate impact with disparate treatment in finding that a suitable alternative to the reduction in force ("RIF") would have been to have more safeguards against subjectivity and "managerial bias." (Petition 32a). This suggested alternative, never proven at trial, focuses on eliminating intentional discrimination. It is undisputed, however, that the jury's verdict completely exonerated petitioners from any claims of intentional age discrimination.

REASONS FOR GRANTING THE PETITION

I. THE ISSUE OF THE VIABILITY OF A DISPARATE IMPACT CLAIM IS PROPERLY PRESENTED FOR THIS COURT'S REVIEW BECAUSE, AMONG OTHER REASONS, IT WAS PASSED UPON BY THE COURTS BELOW

As discussed in detail in the petition for certiorari, this proceeding involves a legal question of exceptional importance on which the circuit courts of appeals are deeply divided: whether or not a disparate impact claim is available under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. Respondents contend that this Court should deny the petition because petitioners waived this argument by not raising it below, including at trial during the charge conference and that, as a result, respondents were somehow "sandbagged." (Respondents' Brief in Opposition, 11).

This claim should be rejected outright. Under well-established precedent of this Court, which respondents have chosen to ignore, any issue "pressed or passed upon below" by a federal court is subject to this Court's broad discretion over questions it chooses to take on certiorari. *Verizon Communications, Inc. v. Federal Communications Comm'n*, 535 U.S. 467, 530 (2002). *Accord United States v. Williams*, 504 U.S. 36, 41 (1992) (considering the merits of an issue despite party's failure to present it); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (noting that "[i]t suffices for our purposes that the court below passed on the issue presented," particularly where the issue is in a state of evolving definition and uncertainty and is important to the administration of federal law); *Stevens v. Dep't of the Treasury*, 500 U.S. 1, 8 (1991) (holding that the petition for certiorari was properly granted where the legal issue was passed upon by the district court and the court of appeals).

Here, it cannot be genuinely disputed that both the District Court and the Second Circuit passed upon the legal issue of whether or not a disparate impact claim is viable under the ADEA. The District Court passed upon this issue when it denied petitioners' Rule 50 motion for judgment as a matter of law seeking the dismissal of respondents' disparate impact claims. In denying that motion, the District Court reasoned that although other circuit courts of appeal are divided on this issue, the disparate impact theory is still available under the ADEA in the Second Circuit. (Petition 56a). Recognizing that the District Court had passed upon the issue, the Second Circuit also passed upon it and expressly upheld its prior holdings that the "ADEA allows disparate impact claims." (Petition 21a). Thus, this issue is properly presented for review by this Court.

Moreover, although it was not raised at the trial itself, petitioners pressed this issue to both courts below. Petitioners raised this argument on their motion for summary judgment before the District Court. (*See* Petition 20a). Petitioners also pressed this issue before the Second Circuit, specifically requesting that the court reconsider its prior holdings in light of more recent decisions of its sister circuits and other developments in the law. (Petition 3a).

In any event, this question presents a purely legal issue, and there is no proof that respondents would have offered any other proof at trial in support of their disparate impact claims had petitioners raised the viability of such claims at the charge conference. Thus, there is no merit to respondents' claim that they were "sandbagged."

As is evidenced by this Court's granting of the petition to resolve this issue in *Smith v. City of Jackson*, 124 S. Ct. 1724 (2004), the law on this issue is in a state of uncertainty and yet is important to the administration of the ADEA. Given

the number of cases that have examined the issue and the significant split in the circuits, the issue is ripe for a definitive resolution by this Court, a fact which respondents concede in their brief. (Respondents' Brief in Opposition 12). Accordingly, the petition should be granted, at a minimum, to hold it for disposition in accordance with the ultimate decision in *City of Jackson.*

In addition, as discussed in Points II and III of the petition and below, the petition also raises other related and extremely important federal issues that merit the Court's attention.

II. ASSUMING THE AVAILABILITY OF A DISPARATE IMPACT CLAIM, COMPELLING REASONS EXIST FOR SETTLING THE STANDARDS TO BE APPLIED IN RESOLVING SUCH A CLAIM

Even if this Court determines that a disparate impact claim is viable under the ADEA, this case presents a unique and perfect opportunity for the Court to settle exactly what a plaintiff's burden of proof is at trial concerning a disparate impact ADEA claim.

Respondents claim that the petition should not be granted on this issue because petitioners have not demonstrated a conflict in the circuits in determining what a plaintiff's burden of proof is on an ADEA adverse impact claim. They urge the Court to permit the courts of appeals to express their own opinions on this issue first. For the reasons cited below and in the petition, however, there are compelling reasons for this Court to settle this issue now. (Petition 10-17).

While there is no existing conflict yet as to the standards of proof on a disparate impact ADEA claim, in their discussion of the availability of a disparate impact claim under the ADEA, the circuit courts are already sharply divided

as to how to interpret the ADEA's provisions in light of the exception to the statute's general prohibitions against age discrimination for actions taken based upon "reasonable factors other than age." 29 U.S.C. § 623(f)(1). A majority of circuits have held that this exception precludes a disparate impact claim altogether, while others, including the Second Circuit, have concluded otherwise. (Petition 6-9).

As pointed out in the petition, as well as by the parties in the *City of Jackson* case, the Equal Employment Opportunity Commission takes a different position altogether, having issued regulations that purport to require employers to establish, as an affirmative defense, a business necessity for their decisions. (Petition 11).

The standards or burdens of proof for a disparate impact ADEA claim, should such claim be viable, are inextricably tied to the availability of the claim itself such that the burden of proof issue should also be decided. Indeed, during oral argument in the *City of Jackson* case, this Court asked several questions which were directed at the applicable standards for proving a disparate impact claim, even though that this issue had not been squarely raised, given the ADEA's statutory exception for actions that are based upon reasonable factors other than age.

Moreover, unlike Title VII claims subject to the Civil Rights Act of 1991, which codified the respective burdens of proof and persuasion for disparate impact claims under that statute, 42 U.S.C. § 2000e-2(k), the ADEA is devoid of any standards for the courts to apply. (*See* Petition 8). As a result, the statute itself provides no guidance to the courts on this issue. Thus, in light of the above conflicting interpretations of the statute and lack of guidance from Congress, the issue of the proper standards to be applied on an ADEA disparate impact claim is now ripe for resolution by this Court.

In any event, petitioners do not have to demonstrate that a conflict exists on this precise issue for this Court to grant the petition. (*See* Sup. Ct. R. 10). To the extent that this Court decides to apply the same standards as it has applied in disparate impact cases under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*., the Second Circuit has so departed from that standard, and from the accepted and usual course of judicial proceedings, that this Court should exercise its supervisory powers and grant this petition.

It is undisputed that both the District Court and the Second Circuit found that petitioners met their burden of offering proof that they had "facially legitimate business reasons for the IRIF and its constituent parts." (Petition 30a). At that point, under the burden of proof analysis in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), respondents were required to prove that there were equally effective alternatives to the specific employment practices being challenged.

At trial, respondents relied upon two alternatives, which were actually alternatives to the RIF itself, which the Second Circuit correctly found were not sufficient to satisfy respondents' burden of proof at trial. (Petition 31a). In direct conflict with this Court's decisions in *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988), and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Second Circuit then suggested that petitioners should have used criteria that were not as subjective as flexibility and criticality of skills and, thus, were less subject to managerial bias. (Petition 32a). The Second Circuit affirmed the judgment of liability without identifying specifically what those criteria were, let alone finding proof that such unspecified criteria would have resulted in employees under the age of forty being selected for the RIF instead of older employees. (*Id.*).

In doing so, the Second Circuit materially deviated from the standards for proving a disparate impact claim, as articulated by this Court in Title VII cases. Moreover, the Second Circuit usurped the jury's function to weigh the evidence presented and nullified its verdict with regard to the disparate treatment claim. This deviation from the accepted and usual course of proceedings should be reviewed by this Court. As a practical matter, if these issues are not resolved by this Court, or if the Second Circuit's decision is permitted to stand, employers are likely to resort to giving preferential treatment to older workers, or worse, imposing quotas. Respondents have simply ignored these compelling reasons for granting the petition.

In any event, to the extent that petitioners' arguments concerning the standards of proof to be applied in resolving a disparate impact claim include new arguments not raised below, it cannot be disputed that this Court has the broad discretion to consider such new arguments because this area of law is evolving and uncertain. *See Virginia Bankshares*, 501 U.S. at 1099 n.8; *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 n.27 (2001).

III. THE SECOND CIRCUIT'S REFUSAL TO APPLY INTERMEDIATE STATE COURT DECISIONS WAS PLAIN ERROR AND INVALIDATED STATE LAW

Petitioners urge this Court to review the Second Circuit's decision with regard to respondents' state law age discrimination claim because the decision below conflicts with relevant and important decisions of this Court on how and when to apply state law. *See West v. AT&T*, 311 U.S. 223, 236-237 (1940), and cases cited in Petition 17-20.

Respondents disagree, claiming that the state law claim does not present a compelling federal question. This is simply

not the case. Indeed, while this Court does not ordinarily grant certiorari to review questions of state law decided by the federal courts, the Court has done so where the lower courts have committed plain error. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

As this Court has reasoned in other cases, a petition for certiorari to review a judgment of a federal court of appeals undoubtedly should be granted where the lower court's interpretation of state law was plainly wrong and had the effect of totally invalidating state law. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (per curiam). That is precisely the case here. The Second Circuit committed plain error in refusing to consider and apply new developments in New York state law, as articulated by the intermediate appellate court in the very same judicial department where this case was tried (the Appellate Division of the New York Supreme Court for the Third Department).

This Court should reject respondents' contention that the Second Circuit was justified in ignoring these decisions because the intermediate appellate court interpretations of the state anti-discrimination law were wrongly decided. The Second Circuit had an obligation to determine and apply the content of New York law even if it thought that the rule articulated by the New York intermediate appellate court was unsound or that another rule was preferable. This is true even if the rule had not yet received the sanction of the highest state court. *West*, 311 U.S. at 236 ("[A] federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.").

Similarly, respondents' claim that the Second Circuit was justified in failing to address the state law claim on grounds of waiver ignores the fact that this was a new development in state law, decided only after the trial in this case. As the

Supreme Court recognized in *Vanderbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941), however, the duty of the federal court is to mirror state law as it exists at the time its decision is rendered.

The effect of the Second Circuit's plain error in refusing to follow the precedent of this Court is to invalidate totally New York law, as interpreted by an intermediate appellate court, and to permit a judgment of liability to stand where no such cause of action even exists under state law.

CONCLUSION

Petitioners respectfully request that this Court grant the petition for certiorari.

Respectfully submitted,

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